

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

EARL G. SELBY)	
Claimant)	
VS.)	
)	
SONIC DRIVE IN)	Docket No. 1,026,245
Respondent)	
AND)	
)	
HARTFORD UNDERWRITERS INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals the preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes dated January 19, 2006. Claimant was awarded medical treatment with one of three physicians to be listed by respondent, and temporary total disability beginning November 6, 2005, and continuing until claimant is released to substantial and gainful employment.

ISSUES

1. Did claimant suffer accidental injury arising out of and in the course of his employment with respondent?
2. What was claimant's average weekly wage on the date of accident?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the Administrative Law Judge (ALJ) should be affirmed.

Claimant was hired by respondent in September 2005 as a cook at its East Harry restaurant. Claimant was required, by the health code, to wear gloves while working. Claimant testified that he began having problems with his hands in mid-October 2005. Claimant's hands began swelling, cracking and itching. Claimant discussed his problem with his supervisors, but was provided no medical care. Claimant was told to wash and dry his hands. Claimant followed these instructions for several weeks, with no improvement.

Claimant then went to the emergency room at Wesley Medical Center. Claimant was released to return to work, but cautioned to not wear gloves. As the health department would not allow workers to work without gloves, this precluded claimant from returning to work with respondent.

When claimant visited the emergency room, he mistakenly advised the doctor he was required to wear latex gloves. Claimant testified that he was told by a co-worker the gloves were latex. The doctor, in the emergency room report of November 7, 2005, noted the cause of claimant's problems as "possibly latex gloves."¹ The emergency room report also noted claimant's rash was "from the gloves at work."²

Respondent contends the gloves worn by claimant were vinyl. Respondent's area supervisor Mary Smith testified that respondent never ordered latex gloves due to the tendency of people to be allergic to them. She said respondent did not have an option to order latex gloves. Respondent, therefore, argues claimant's problem could not have originated with its gloves.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.³

The two phrases "out of" and "in the course of" used in K.S.A. 44-501,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental

¹ P.H. Trans., Cl. Ex. 1 at 7.

² P.H. Trans., Cl. Ex. 1 at 3.

³ K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

injury and the employment. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.”⁴

Here, claimant alleges injury when his hands became itchy, cracked and swollen from exposure to gloves at work. The Board finds, by the barest of margins, that claimant has proven he suffered accidental injury arising out of and in the course of his employment. The Board acknowledges a dispute exists regarding the types of gloves claimant wore. However, whether the gloves were made of latex or vinyl, the Board finds that the gloves caused claimant’s condition. The ALJ’s award of benefits is affirmed.

Claimant argues in his brief that his average weekly wage should be based on a 38- to 40-hour work week. Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board’s jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?⁵

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁶

Claimant’s appeal on this issue is dismissed.

⁴ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

⁵ K.S.A. 44-534a(a)(2).

⁶ *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Allen v. Craig*, 1 Kan. App. 2d 301, 564 P.2d 552, rev. denied 221 Kan. 757 (1977); *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683 P.2d 902 (1984).

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated January 19, 2006, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April, 2006.

BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Vincent A. Burnett/Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director